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35TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 290.

CHEROKEE RESERVATIONS.

[To accompany Bill H. R. No. 270.]

APRIL 17, 1858.

Mr. GREENWOOD, from the Committee on Indian Affairs, made the following

REPORT.

The Committee on Indian Affairs, to whom were referred sundry memorials from citizens of Tennessee, in relation to the reservations under the treaties of 1817 *and* 1819 *with the Cherokees, have considered the same, and report:*

By the eighth article of the treaty of 1817 with the Cherokees, (U. S. Statutes at Large, vol. 7, page 156,) it was provided as follows:

"And to each and every head of any Indian family residing on the east side of the Mississippi river, on the lands that are now, or may hereafter be, surrendered to the United States, the United States do agree to give a reservation of six hundred and forty acres of land, in a square, to include their improvements, which are to be as near the centre thereof as practicable, in which they will have a life estate, with a reversion in fee simple to their children, reserving to the widow her dower, the register of whose names is to be filed in the office of the Cherokee agent, which shall be kept open till the census is taken, as stipulated in the third article of this treaty: *Provided*, That if any of the heads of families for whom reservations may be made should remove therefrom, then, in that case, the right to revert to the United States: *And provided, further*, That the land which may be reserved under this article be deducted from the amount which has been ceded under the first and second articles of this treaty."

In the treaty of 1819 with the Cherokees, (U. S. Statutes at Large, vol. 7, page 195,) the United States, by the second article, "agree to allow a reservation of six hundred and forty acres to each head of any Indian family residing within the ceded territory, those enrolled for the Arkansas excepted, who choose to become citizens of the United States, in the manner stipulated in said treaty"—that of 1817.

Much importance has been heretofore placed upon the first proviso by those claiming the right to give to it its true meaning and interpretation, and *particularly* as to the kind of removal intended for heads of families, to make by the words "*remove therefrom*," in order that

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the fee simple of the children might "*revert*" to the United States; for removal from these reservations by the heads of families, whether east or west, or anywhere at all, has been held a voluntary abandonment, and consequently, not only destroyed the "*life estate*, but also carried with it the "*fee simple*" of the children; and thus, for the want of a proper and correct understanding by those adjudicating of the relative meaning of the words "remove therefrom," originated all the difficulty to a final settlement of these claims.

With a view, therefore, of settling the question once for all, as to the kind of removal required in the proviso to work a reversion of the whole estate to the United States, was a removal by the heads of families west of the Mississippi river and settlement upon vacant lands belonging to the United States. And then, to make the reversion complete, the removal must have taken place previous to the expiration of the time fixed in the third article for the completion of the census. It was also the duty of such heads of families electing to become citizens as required, and who afterwards determining to abandon their reservations, first to have declared that intention to the Cherokee agent, whose duty it was to make an entry in the register opposite such names "*removed west.*" He was created judge by the eighth article, and the only competent judge, to determine who were heads of families and who were not. The register was kept by him, in which the names were recorded, the number of families and their locations, thus showing at the time what was understood to be the kind of removal it took to work a reversionary title of said reservations. This register, too, was only to be kept open until the time expired for the completion of the census, after which no act of the heads of families could destroy the "*fee simple*" of the children, and the register must be taken as final and conclusive on these points. In other words, there is no going behind the record. The original being now on file in the office of the Commissioner of Indian Affairs, your committee have examined the same and find the foregoing facts fully confirmed by it.

In this way, and this way *only*, could such reversion have taken place, the whole scope of the treaty of 1817 being an exchange of land "*acre* for *acre.*"—(See article 5.) And to pretend that a reversion of said reservations to the United States could have taken place in any other manner, would be to deny the plain and manifest intention of the parties to the treaty. Furthermore, it must not be forgotten that the Cherokee nation was proprietor of the lands east of the Mississippi, which they proposed to exchange for lands west of that river, where the United States was proprietor. The term "*revert*" cannot, therefore, be taken in any other sense than *simply* a fair exchange of land between the parties. This view is further sustained by the second proviso: "That the land which may be reserved under this article be deducted from the amount which has been ceded under the first and second articles of this treaty."

In an opinion of Mr. Attorney General Butler, of May the 14th, 1839, upon the rights of the children, he says:

"The children of reservees under the eighth article of the treaty of 1817 were entitled, by the express words of that article, to reversion in *fee simple*. The father having only a life estate, the estate of the

children could not be diverted by any act of the ancestor; and if they have been obliged by the laws of the States to abandon their reversionary rights, or to purchase them from the States, they will be entitled to compensation."—(Opinions of Attorneys General, p. vol. —.)

In support of the foregoing views and facts, will be found the further significant fact, that the census stipulated to be taken, in the third article, of all the Cherokees both east and west, in the month of June, 1818, was not taken at any time—the United States having failed to make the appointment of agents; and the Cherokee nation east of the Mississippi foreseeing what would doubtless have happened to their nationality by permitting the door to be kept open longer for removal, and the taking of reservations under the treaty of 1817, appointed a delegation who visited Washington city and negotiated he treaty of 1819. For what purpose, the preamble and several articles of that treaty will show.

The preamble sets forth: "Whereas a greater part of the Cherokee nation have expressed an earnest desire to remain on this (east) side of the Mississippi, and being desirous, in order to commence those measures which they deem necessary to the civilization and preservation of their nation, that the treaty between the United States and them, signed the 8th of July, 1817, might, without further delay, or the trouble or expense of taking the census as stipulated in the said treaty, be finally adjusted, have offered to cede to the United States," &c.

The first part of article one specifies the boundaries of the territory ceded by the Cherokee nation to the United States; and the second part of said article expresses the purpose for which it was ceded, in these words: "And it is further understood and agreed by the said parties that the lands hereby ceded by the Cherokees are in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation *who* have, or may *hereafter* emigrate to the Arkansas; and *this* treaty is a *final* adjustment of *that* of the 8th July, 1817."

Article two, already quoted in the first part of this report, gives a reservation of 640 acres to each head of *any* Indian family residing within the *ceded* territory, *those enrolled* for the Arkansas *excepted*, who choose to become citizens of the United States, in the manner stipulated in said treaty.

After the negotiation of this treaty, and the granting of reservations upon the lands ceded by it, in the manner stipulated by the eighth article of the treaty of 1817, and also ceding to the United States a sufficient quantity of land in full satisfaction of all claims which the United States had on the Cherokees, on account of those who had or might thereafter emigrate to Arkansas, which treaty was a *final* adjustment of *that* of 1817; and then, after all *these* treaty guarantees, to say that *any* kind of "*removal therefrom*," by the heads of families, would or *could* destroy the "*fee simple*" of the children to *any* of these reservations, and thereby cause their rights to the same to "*revert*" to the United States, would be to establish a precedent unexampled in the history of civil jurisprudence.

Should your committee be in error as to the foregoing conclusions,

they desire to present another view of this case, in order to ascertain what they conceive to be the law that should govern in the settlement of the rights of parties growing out of those treaties.

The eighth article of the treaty of 1817 did not originate with the commissioners who negotiated it, but was dictated in the instructions from the Secretary of War, under which they acted, and which may be found in the American State Papers, Indian Affairs, vol. 9, page 142. The following extract is made from those instructions:

"Those individuals (and they are understood to be numerous) who have acquired property, and wish to remain, and who experience the daily increasing embarrassments and difficulties arising from the want of proper laws for the protection of that property, will, it is believed, find sufficient inducements for the exchange, in the benefits which they will derive from the enjoyment of the rights and immunities of a citizen of the United States, and in the protection of the laws of the particular State or Territory in which they may reside; and in the assignment of a section of six hundred and forty acres of land, (and more, if, in particular instances, it may be deemed necessary,) to the head of each family, in which they will have a life estate, with a reversion in fee simple to their child or children, reserving to the widow her dower."

The considerations which justify, and probably dictated the policy of granting a life estate only to the first takers of these reservations, are numerous and obvious. Among them is the fact, that many of these heads of Cherokee families were whites, who had intermarried with Cherokee women, so that the preservation of the right of dower and of the fee simple estate in reversion to the children, became a matter of justice, as well as of policy.

If the words of the first proviso to the eighth article of the treaty of 1817 be construed to make the reversion in fee simple already granted absolutely to certain designated persons—namely: the children of heads of families taking reservations conditional upon the acts of the persons vested with the life estate—the proviso would be void for repugnancy to a grant already made, and therefore as ineffectual in law, as it would be unjust and wanton in sacrificing innocent parties. A proviso in a deed, endeavoring to vacate an absolute vested estate, granted or created in the earlier part of the deed, is void. This is not a life estate to one, with remainder in fee to his heirs; in which case, by what lawyers call the rule in Shelley's case, the heirs would take by *descent* and *as* heirs; and in which case, therefore, the first taker would be held to have the entire estate, with the power to dispose of it in fee. Here, the remainder is to the *children*, who are specific persons, and do not take as *heirs* at all. It is precisely as if the grant was to A for life, and, at his death, to his son B.

It is not necessary, or even natural, however, to give to this proviso (added to the treaty by the commissioners) a construction, which, if effectual in law, would defeat the precisely defined objects of the INSTRUCTIONS UNDER WHICH THEY ACTED. A better construction is, that it only made the life estate dependent upon the non-removal of the tenant of the life estate; and the probable purpose of providing that this life estate should revert to the United States, was to bar any interfer-

ing rights of the States in which the lands were situated; so as to secure more perfectly the reversion in fee simple intended to be provided for.

This question has been considered during the last Congress by the Senate's Committee on Private Land Claims, whose two reports [accompanying Senate bill 275] are referred to. The question considered by that committee related to a reservation taken by John McNary, and they say:

"To have entitled John McNary to a life estate under the said treaties, he must have been registered, and have complied with all the requisitions of the treaty of 1817; and whenever, under the treaty, his life estate attached, the fee simple passed to his children with the reservation of dower to the widow."

In the opinion of your committee, the rights of these children are indestructable in law, except by their own acts, and the faith of the government is pledged, in a most peculiar and sacred manner, to uphold them.

By the treaties of 1817 and 1819, we acquired about four millions of acres from the Cherokees without money equivalents, giving acre for acre in lands on the Arkansas. In the reckoning of what we received, these reservations were deducted and diminished to that extent what we gave in return, so that they have never received any equivalent whatever for these reservations.

"*Those who remain may be assured of our patronage, our aid, and good neighborhood.*" These words, quoted from an address to the Cherokees by President Jefferson, form a part of the preamble of the treaty of 1817, and illustrate the spirit in which it should be executed.

The history of these reservations, to the present time, may be summed up in a few words. In Georgia, where more than half of them were made, and in Tennessee, the tenants of the life estate have been obliged to succumb to the legislation of those States. Georgia was entitled, by the convention of 1802 with the United States, to claim that the latter should extinguish the Indian title within her limits, and on that ground resisted these reservations. Upon what grounds Tennessee proceeded is not so clear. The legislation of North Carolina was never, in terms, directed against these reservations. That State, however, appointed commissioners to survey and sell all the lands acquired by the treaties of 1817 and 1819, omitting any notice of the reservations; and as the commissioners included them in their surveys, and sales, titles were obtained, resting apparently upon the authority of the State, which conflicted with the title of the Indian reserves. The conflict was terminated by obtaining releases from the Indians holding the life estate for considerations totally inadeqdate. An account of a portion of these proceedings, as well as an elucidation of many of the legal principles connected with these reservations, will be found in the opinions of the supreme court of North Carolina, in the case of Euchulah *vs.* Walsh.—(3 Hawks, 155.) In Alabama no rights of the State were ever asserted against these reservations, and they have fallen into the hands of individuals, in some instances, too probably, by violence and overreaching, and in other

instances, by purchases from the tenants of the life estate, made in ignorance of the ultimate title of their children.

As now, by the death of the tenants of the life estate, the title of their children is becoming perfect, it is being asserted by suits, to the great alarm of the communities concerned; and some remedial and comprehensive measure seems to be called for.

If it could be assumed that, in consequence of an adverse pressure upon courts and juries, the rights of these children cannot be legally enforced, it would be the duty this government to indemnify and relieve them. We owe to them something more than even exact good faith, because they were and are our wards. Treaties may add something to our duties as their guardians, but cannot make those duties less.

If it is assumed, on the other hand, that the rights of these children can be legally forced, it is urged by the memorialists, that, for the prevention of expensive and harassing litigation, as also for the relief of parties misled by a misunderstanding of the treaty of 1835 with the Cherokees, the same discretion of this government should interpose some measure of relief.

In the case of Georgia, at any rate, if the rights of these reserves are maintained in the courts, the United States will be compelled to respond for the value of the property, under the convention with Georgia of 1802.

The treaty of 1835 with the Cherokees (U. S. Statutes at Large vol. 7, p. 478) provides, in the thirteenth article, that "all such reserves as were obliged by the laws of the States in which their reservations were situated to abandon the same * * * shall be deemed to have a just claim against the United States * * * * to the present value of such reservations as unimproved lands." By the seventeenth article, it is provided that "all the claims arising under or provided for in the several articles of this treaty shall be examined and adjudicated" by certain commissioners, whose "decision shall be final;" and at the commencement of the thirteenth article, it is declared to be the intention "to make a final settlement of all the claims of the Cherokees for reservations granted under the former treaties." It is averred, in substance, by the memorialists that, in purchasing titles adverse to those of the Indian reserves, they believed that the treaty of 1835 had provided effectually and finally for these latter titles. Your committee are satisfied that such a belief has extensively prevailed; and it is apparent that the phrases of the treaty are calculated to produce it. The people are not to be presumed to have a better knowledge of private rights than those who have been intrusted with the responsible duty of negotiating treaties. If the commissioners who negotiated the treaty of 1835 were ignorant of, or inattentive to the indefeasible rights of the children of the Indian reserves under the treaties of 1817 and 1819, and undertook to make a "final settlement" of those reservations by provisions which, on their face, are only applicable to the tenants of the life estate, it is not to be wondered at that the estates in reversion, neglected and overlooked by officials, should be neglected and overlooked by the people.

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The question is not now as to the tenants of the life estate in these reservations, the great majority of whom have died. If that question was presented, however, nothing would seem to be more plain and certain, that they were not parties in law, or in fact, to the treaty of 1835; that their rights were in no wise concluded by it, and that they were not bound to submit their claims to the adjudication of any commission instituted under it The utmost which could be said is, and even this with some qualifications, that those who did in fact receive a compensation, awarded by such a commission for the coerced abandonment of reservations, are not entitled to any further redress.

None of the children of the heads of families taking reservations, ever applied for redress under the treaty of 1835. They were, many of them, not in a condition, in respect of age, to do so; nor were they, any of them, within the provisions of the treaty. They had not been compelled to abandon the reservations by the laws of the States. They had never come into possession of them. Their fathers, and not themselves, had been the subjects of coerced removal. In most instances even their right of possession had not matured.

Whilst, however, the treaty of 1835, whatever popular mistakes its language may have caused, could, in truth, take away no rights from those who were not parties to it, or who did not come in afterwards and voluntarily accept its terms, it contains proof that those who then administered this government conceived themselves to be bound to do something more for the reservees of 1817 and 1819 than to leave them to enforce their rights in the courts. For such of them as had been forced to abandon their reservations, or to purchase a second title to them from the States, this treaty of 1835 provided an indemnity for the life estate tenants, to be paid out of the treasury of the United States, and expressly declares that this indemnity is due to them under the treaties of 1817 and 1819, and is entirely independent of the new agreements entered into upon new considerations by the United States in 1835.

Such, also, appears to have been the view of duty acted upon here since 1835. In both the Congresses preceding the present one, indemnities have been granted to reservees, under the treaties of 1817 and 1819, who have made individual applications for redress.

The whole number of heads of families who took life estate reservations under the treaties of 1817 and 1819 was three hundred and eleven. Your committee are not able to say in what proportion of the cases the reservations are held by titles adverse to and in derogation of the rights of their children, or in what proportion of the cases, by the death of the life estate tenants without children to succeed them, no parties remain to be redressed.

Under all the circumstances, unwilling to subject these reservees to the hazards of losing their just rights by a sinister influence operating upon local tribunals, and at the same time appreciating the disastrous consequences to the communities concerned of the enforcement of these rights; considering that they constitute, certainly in the case of the Georgia reservations, a charge in some form upon the public treasury; admitting the probability that the language of the treaty of 1835 has misled many present purchasers and holders of these reservations;

considering that the same views of public justice and policy which in 1835 dictated an idemnity from the public treasury to the tenants of the life estate forced to abandon by State laws, now dictate a similar indemnity to the dispossessed reversioners in fee simple; and considering, finally, that it is not easy to escape such a construction of the thirteenth article of the treaty of 1835 as would make the indemnification of those reversioners a matter of strict treaty obligation, your committee have concluded to report the accompanying bill.

In arranging the details of this bill, your committee have not only followed the precedent of the treaty of 1835 in fixing the powers of the commission proposed to be created, but have had in view the necessity of providing a certain, prompt, and unconditional extinguishment of the right of the children of these life estate reservees. No measure short of this will put a stop to the numerous suits, commenced and impending, against which the memorialists ask relief.

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